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No. ____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

NORTHWEST COMMERCIAL FISHERMEN'S FEDERAL RECOVERY ASSOCIATION,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

---

PETITION FOR WRIT OF CERTIORARI

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March 4, 1985

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

6 pp

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

No. _____

NORTHWEST COMMERCIAL FISHERMEN'S FEDERAL RECOVERY ASSOCIATION, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR WRIT OF CERTIORARI

QUESTIONS PRESENTED

WHETHER THE COURT OF APPEALS FOR THE FEDERAL CIRCUIT ERRED IN GRANTING RESPONDENT'S MOTION TO DISMISS PETITIONER'S APPEAL FROM THE CLAIMS COURT'S DENIAL OF AN EXTENTION OF TIME FOR PETITIONER TO FILE ITS NOTICE OF APPEAL FROM THAT COURT'S JUDGMENT OF MAY 3, 1984.

PARTIES

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JURISDICTION OF THE COURT

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

UNITED STATES CONSTITUTIONAL PROVISIONS AND COURT RULES INVOLVED

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be put twice in jeopardy of life and limb; nor shall be compelled in any Criminal Case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT XIV

Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

CLAIMS COURT RULE 72

Review of a decision of this court shall be obtained by filing a notice of appeal with the clerk within the time and manner prescribed for appeals to United States courts of appeals from United States district courts.

FEDERAL RULE OF APPELLATE PROCEDURE 4(a) SECTIONS 1 AND 5

In a civil case in which an appeal is permitted by law as of right from a district to a court of appeals the notice of appeal required by Rule 3 shall be filed with the clerk of the district court within 30 days after the date of entry of the judgment or order appealed from; but if the United States or an officer or agency thereof is a party, the notice of appeal may be filed by any party within 60 days after such entry. If a notice of appeal is mistakenly filed in the court of appeals, the clerk of the court of appeals shall note thereon the date on which it was received and transmit it to the clerk of the district court and it shall be deemed filed in the district court on the date so noted.

(5) The district court, upon a showing of excusable neglect or good cause, may extend the time for filing a notice of appeal upon motion filed not later than 30 days after the expiration of the time prescribed by this Rule 4(a). Any such motion which is filed before expiration of the prescribed time may be ex parte unless the court otherwise requires. Notice of any such motion shall be given to the other parties in accordance with local rules. No

such extension shall exceed 10 days past such prescribed time or 10 days from the date of entry of the order granting the motion, whichever occurs later.

STATEMENT OF THE CASE AND OF ISSUES PRESERVED ON APPEAL

This is a petition for certiorari filed after respondent's motion to dismiss petitioner's appeal was granted by the Federal Circuit on December 12, 1984. The appeal was taken to the Federal Circuit after the Claims Court refused to grant petitioner's motion for an extension of time to file its notice of appeal from that court's judgment of May 3, 1984.

Petitioner, Northwest Commercial Fishermen's Federal Recovery Association, is the assignee of the claims of the individual members of the Association against the United States for its intentional and/or negligent acts which interfered with, damaged, and took its assignors' property rights created by the commercial fishing licenses they were granted by the State of Washington.

The petitioner's claims arise from

the actions of the United States and its agents in the conduct and decision of the case of United States v. Washington (W.D. Wash. 1974) 384 F.Supp. 312, aff'd (9th Cir. 1975) 520 F.2d 676, cert. den. (1975) 423 U.S. 1086, rehrg. den. (1976) 424 U.S. 978. In 1970, the United States Attorney General, on behalf of various Northwest Indian tribes, brought an action in the U.S. District Court of Washington to declare the rights of those Indian tribes under various treaties made with the United States before Washington became a State, alleging that the State of Washington was interfering with those rights by regulations and practices interfering with their access to fish in Washington's coastal waters. Id., at 327-328. The District Court's decision interpreted the treaties to mean that the members of the treaty tribes had been reserved a right to have access to and to harvest up

to 45-50% of all harvestable fish at their usual and accustomed grounds and stations in Washington's coastal waters. The court held that the State of Washington not only could not interfere with this right (except as might be absolutely necessary to preserve the fishery species), but also must affirmatively protect this right by state regulations that would prohibit non-treaty Indians, including state-licensed commercial fishermen, from taking more than their allotted 50% share of the fish. Id., at 343-344.

Between 1974 and 1978, the District Court attempted to enforce its decision by a series of orders and injunctions, while the State of Washington was through its courts issuing counter-orders and denying the authority of the District Court. See the history recited in Puget Sound Gillnetters Assn. v. U.S. District Court (9th Cir. 1978) 573 F.2d 1123, and

State of Washington v. Washington State Commercial Passenger Fishing Vessel Assn. (1979) 443 U.S. 658, 99 S.Ct. 3305, 61 L.Ed.2d 823. The latter decision finally put to rest any judicial dispute over the authority of the District Court to enforce its 1974 decision. Thereupon petitioner was formed and filed a claim in the District Court of the Western District of Washington to recover just compensation for the valuable property rights of which the District Court's decision, as interpreted by the Supreme Court, had ultimately deprived them. The District Court's jurisdiction over this matter was based on 28 U.S.C. §1331.

On June 15, 1981, the Court made its Order granting respondent's motion for summary judgment. Petitioner took an appeal of this Order to the Court of Appeals for the Ninth Circuit; that court's jurisdiction was based on 28 U.S.C §1291.

On November 24, 1982, the Ninth Circuit issued its opinion affirming the summary judgment in part, but remanding the taking portion of that judgment to the district court for possible transfer to the Claims Court. Petitioner's motion for transfer was granted on February 2, 1983. The Claims Court's jurisdiction was based on 28 U.S.C. §1491. On May 3, 1984, the Claims Court granted respondent's motion and dismissed the case.

Petitioner mailed its notice of appeal from that dismissal on June 28, 1984. The notice arrived at the Claims Court on July 5, 1984, one day late, and was rejected as being untimely filed. On July 10, 1984, petitioner filed a motion to extend time to file notice of appeal. This motion was denied on August 4, 1984.

Petitioner filed its notice of appeal from the denial of its motion on

September 25, 1984. The Federal Circuit's jurisdiction to hear the appeal was based on 28 U.S.C. §1291. On October 9, 1984, respondent moved, in the Federal Circuit, to dismiss the appeal. That motion was granted on December 12, 1984.

ARGUMENT

I. THE COURT OF APPEALS FOR THE FEDERAL CIRCUIT ERRED IN FINDING THAT THE CLAIMS COURT HAD NOT ABUSED ITS DISCRETION IN DENYING PETITIONER'S MOTION FOR AN EXTENSION OF TIME TO FILE A NOTICE OF APPEAL.

Claims Court Rule 72 states that "[r]eview of a decision of this court shall be obtained by filing a notice of appeal with the clerk within the time and manner provided for appeals to United States Courts of Appeals from United States District Courts." The rule applicable to the case at bar is Federal Rule of Appellate Procedure (FRAP) 4(a)(5) which provides in relevant part that "[a] district court, upon a showing of excusable neglect, may extend the time for filing a notice of appeal ...."

Thus, the Claims Court had the discretion to accept appellant's request for an extension of time to file a notice of appeal. Gooch v. Skelley Oil (10th Cir. 1974) 493 F.2d 366, cert. den. (1974) 419 U.S. 997. Its decision that the delay was not due to excusable neglect may be reversed as an abuse of this discretion if petitioner now makes a showing to the contrary. Chipser v. Kohnmeyer & Co. (5th Cir. 1979) 600 F.2d 1061; Benoist v. Brotherhood of Locomotive Engineers (8th Cir. 1977) 555 F.2d 671. A reviewing court may overturn a lower court's decision on a discretionary matter if "it has a definite and clear error in judgment in the conclusion it reached upon a weighing of the relevant facts." Lowry v. Long Island R.R. (2d Cir. 1966) 320 F.2d 911, 912, citing In Re Jossephson (1st Cir. 1954) 218 F.2d 174.

Such an error can be shown in this

case. The cases relied upon by the Claims Court and impliedly by the Federal Circuit are distinguishable from the present case. Both Matter of Bad Bubba Racing Products, Inc. (5th Cir. 1980) 609 F 2d 815 and LeJeune v. Midwestern Insurance Co. (5th Cir. 1952) 197 F.2d 149 stand for the proposition that mailing a notice of appeal is not equivalent to filing the document. Petitioner does not contest that proposition; no claim is made that the notice was filed on or before the required July 2 date. Petitioner does contend, however, that the notice of appeal was filed after July 2 due to excusable neglect.

This is not a case of "a mere palpable mistake by experienced counsel." See Spound v. Mohasco Industries, Inc. (1st Cir. 1976) 534 F.2d 404, cert. den. (1976) 429 U.S. 886. Nor is this a "mistake of counsel, without more" which apparently

"would not be considered excusable neglect by [the Federal Circuit]." Prestex, Inc. v. United States (1983) 4 Cl.Ct. 14, aff'd (Fed.Cir. July 27, 1984) Mem. No. 84-790. In Prestex the notice of appeal was filed late because the attorney miscalculated the appeal time. No such error was made in the present case. Also, counsel in this case and his employees did not incorrectly note the date upon which the appeal period expired or mistakenly address the notice of appeal to an incorrect court. See Airline Pilots v. Executive Airlines, Inc. (1st Cir. 1978) 569 F.2d 1174; Oregon v. Champion International Corp. (9th Cir. 1982) 680 F.2d 300.

This case is also distinguishable from Sprout v. Farmer's Insurance Exchange (9th Cir. 1982) 681 F.2d 587. In Sprout counsel simply failed to prepare a notice of appeal. In the case at bar, a notice of appeal was prepared and properly

dispatched to the proper court. Counsel did not delay until the last day of the appeal period to mail the notice of appeal, but dispatched that notice in what appeared to be ample time (i.e., on June 28, 1984, four days before due, via United States mail). Cf., H.L. Smith, Inc. v. Allied Chemical Corp. (M.D. La. 1983) 564 F.Supp. 377.

In sum, petitioner and its counsel did everything within their power to assure that the notice of appeal was filed within the appropriate time limitations. No defect in office procedure or mistake of counsel led to the delay; counsel does not maintain that work on other matters caused the delay. Cf., Pinero-Schroeder v. Fed. Natl. Mortg. Assn. (1st Cir. 1978) 574 F.2d 1117; Pasquale v. Finch (1st Cir. 1969) 418 F.2d 627 (misrouting of notice in Justice Department). "[R]eliance on the normal course of delivery of mail is

reasonable and may be the basis for a court to excuse otherwise untimely filing." Sanchez v. Board of Regents (5th Cir. 1980) 625 F.2d 521, 522. See Fallen v. United States (1964) 378 U.S. 139, 84 S.Ct. 1689, 12 L.Ed.2d 769. The delay in the mail was entirely out of petitioner's counsel's control; this surely is a situation "in which tardiness is excusable and it is unfair to dismiss an appeal because of late filing of notice." Feeder Line Towing Service, Inc. v. Toledo P.&W. R.R. Co. (7th Cir. 1976) 539 F.2d 1107. It would certainly be unfair to penalize petitioner because the mails were unexpectedly slow. The Claims Court's refusal of an extension of time should, therefore, be reversed.

II. THE INTERESTS OF JUSTICE REQUIRE THAT THIS CASE BE CONSIDERED ON ITS MERITS.

Respondent emphasizes that this case has been in the federal courts since 1979

and urges that the interests of justice require that it be summarily disposed of. Merely because this litigation has taken a long and circuitous path through the court system does not mean that it should be disposed of as quickly as possible on a procedural technicality. Similarly, the fact that the Ninth Circuit commented on the merits of some of appellant's claims is irrelevant. That court's ultimate decision was that it had no jurisdiction over this case. Furthermore, the Ninth Circuit noted that the Claims Court might decide the merits differently than the district court based on the rationale of Jackson v. United States (1952) 122 Cl.Ct. 197, 103 F.Supp. 1019.

In Jackson, compensation was awarded for the destruction of the value of a state-issued fishing license, upon facts very similar to those of the instant case. In that case, plaintiff's decedent had

possessed a license from the State of Maryland to conduct commercial fishing operations in certain areas of Chesapeake Bay. In 1943, the federal government redefined certain restricted military proving-ground areas to include decedent's fishing ground, and notified him that he would no longer be permitted to fish there. The court noted that he was unable to fish elsewhere since all other locations had been appropriated by other licensed fishermen. The court held that the fishing right constituted a property right for which compensation was required.

> In a sense, what the plaintiff had before he was forbidden to fish was a property right. It had value, in that he made his living from it.... We think, therefore, that the plaintiff had a sort of property right in his fishing

> ground, and that the Government took that property from him. Id., 103 F. Supp. at 1020.

Accord, Blake v. United States (D.C. Va. 1960) 181 F.Supp. 584, 587; Todd v. United States (Ct. Cl. 1961) 292 F.2d 841, 845.

Thus, in cases involving occupational licenses such as fishing licenses and liquor licenses, courts have frequently recognized a compensable property right where the governmental action significantly damages the economic value of the license, the licensees have made significant investments in personal property and equipment in justifiable reliance thereon, and they are in practice unable to transfer the location of their license in order to continue to realize its economic value. State v. Saugen (1969) 283 Minn. 402, 169 N.W.2d 37; Todd v. United States, supra; Jackson v. United States, supra. Petitioner's claims satisfy all of the

foregoing criteria. It is therefore entitled to compensation for respondent taking its members property. In order for this compensation to be recovered, this Court must reverse the Federal Circuit's decision and allow this case to be heard on its merits.

CONCLUSION

The Federal Circuit erred in deciding that the Claims Court had not abused its discretion in denying petitioner's motion for an extension of time to file a notice of appeal. The delay in filing was due to excusable neglect within the meaning of Federal Rule of Appellate Procedure 4(a)(5). In order for petitioner's members to recover the compensation to which they are entitled, the lower court's decision must be reversed. It is

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for these reasons that petitioner requests this court to grant certiorari.

Respectfully submitted,

K.R. St. Clair
1002 South Third Street
P.O.Box 1169
Mount Vernon, WA 98273
Attorney for Petitioner

CERTIFICATE OF SERVICE BY MAIL

I declare that I have been admitted to practice before this Court and that I represent the petitioner herein.

My business address is 1002 South Third Street, Mount Vernon, Washington 98273.

On February __, 1985, I served the within PETITION FOR WRIT OF CERTIORARI on the interested parties in said cause by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail addressed as follows:

Solicitor General
Department of Justice
Washington, D.C. 20530

Thomas H. Pacheco
Attorney, Appellate Section
United States Dept. of Justice
P.O. Box 7415, Wash. D.C. 20044

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on February __, 1985.

K.R. ST. CLAIR

BEST AVAILABLE COPY

APPENDIX

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K.R. St. Clair
P.O. Box 1169
Mount Vernon, Washington 98273

Thomas H. Pacheco
Department of Justice
Lands Division
Washington, D.C. 20530

RE: Northwest Commercial Fishermen's Federal Association, Inc. v. United States, Appeal No. 84-1778

Dear Messrs. Clair and Pacheco:

On December 12, 1984 the court granted the United States' motion to dismiss the above-captioned appeal.

Very truly yours,

Helen Kane
Motions Staff Attorney

In the United States Claims Court

* * * * * * * * * * * * * * * * * * *

NORTHWEST COMMERCIAL FISHERMEN'S FEDERAL RECOVERY ASSOCIATION, INC.,

Plaintiff,

v.

THE UNITED STATES,

Defendant.

* * * * * * * * * * * * * * * * * * *

No. 51-83C

Notice of appeal; Fed.R.App.P. 4; jurisdiction; pleading and practice; excusable neglect; attorneys.

MEMORANDUM ORDER

Judgment was entered in this case on May 3, 1984. Sixty-one days later, July 3, 1984, plaintiff's notice of appeal was received by the Clerk of Court. When the United States is a party, a notice of appeal must be filed within 60 days of entry of judgment. Fed.R.App.P. 4(a)(1); Sofarelli Associates, Inc. v. United States, 716 F.2d 1395, 1396 (Fed. Cir. 1983). This requirement is "mandatory and jurisdictional." Browder v. Director, Department of Corrections, 434 U.S. 257, 264 (1977), reh'g denied, 434 U.S. 1089 (1978); Sofarelli Associates, Inc. v. United States, 716 F.2d at 1396. Therefore, plaintiff's notice of appeal was returned by the Clerk as untimely the day it was received.

On July 24, 1984, plaintiff moved for an extension of time to file its notice of appeal. It asserts that it "tried to file a timely appeal, but failed to do so due to the time it took for the pleading to reach the United States Claims Court . . . in the United States mail." An accompanying affidavit shows that plaintiff's counsel of record also entrusted another attorney with the responsibility for filing the notice.

Because the time for filing a notice of appeal has expired, this court may grant an extension only upon "a showing of excusable neglect." Fed.R.App.P. 4(a)(5); Prestex, Inc. v. United States, 4 Cl.Ct. 14, 16 (1983), aff'd mem, No. 84-790 (Fed. Cir. July 27, 1984). The requirements for establishing excusable neglect are strict, see Sprout v. Farmers Insurance Exchange, 681 F.2d 587, 588 (9th Cir. 1982); Prestex, Inc. v. United States, 4 Cl.Ct. at 17, and are satisfied only in "extraordinary cases where injustice would otherwise result." See Oregon v. Champion International Corp., 680 F.2d 1300, 1301 (9th Cir. 1982); see also Airline Pilots in the Service of Executive Airlines, Inc., Counsel No. 2 v. Executive Airlines, Inc., 569 F.2d 1174, 1175

(1st Cir. 1978).

Plaintiff's statement that the notice was untimely because of mail service is insufficient to establish excusable neglect. When it elected to send its notice by regular mail from Anacortes, Washington, to Washington, D.C., on Thursday, June 28, 1984, plaintiff assumed the risk that the notice would be received on or before Monday, July 2, 1984. See Matter of Bad Bubba Racing Products, Inc., 609 F.2d 815, 816 (5th Cir. 1980); Lejeune v. Midwestern Insurance Co., 197 F.2d 149, 150 (5th Cir. 1952). On occasion, there may be extraordinary circumstances compelling a different conclusion, see Fallen v. United States, 378 U.S. 139, 143 (1964), but plaintiff has offered no reason why it should not be held responsible for waiting until the last minute to prepare and deliver its notice. See Sprout v. Farmers Insurance Exchange, 681 F.2d at 588; H.L. Smith, Inc. v. Allied Chemical Corp., 564 F. Supp. 377, 378 (M.D. La. 1983). It has the burden to demonstrate excusable neglect. See Craig v. Garrison, 549 F.2d 306, 307 (4th Cir. 1977). If the court granted an extension of time for every notice of appeal untimely

because another was entrusted with filing or the method of delivery was not efficient, the rule would be meaningless and its purpose of promoting finality of judgments would be thwarted. See Oregon v. Champion International Corp., 680 F.2d at 1301; Pasquale v. Finch, 418 F.2d 627, 630 (1st Cir. 1969); Prestex, Inc. v. United States, 4 Cl.Ct. at 19.

Accordingly, plaintiff's motion for an extension of time to file its notice of appeal is DENIED.

August 3, 1984

H. ROBERT MAYER
Judge

In the United States Claims Court

* * * * * * * * * * * * * * * * * *

NORTHWEST COMMERCIAL FISHERMEN'S
FEDERAL RECOVERY ASSOCIATION, INC.

Plaintiff, No. 51083C

v.

THE UNITED STATES,

Defendant.

* * * * * * * * * * * * * * * * * * *

MEMORANDUM ORDER

This case is before the court on defendant's motion to dismiss because the claims violate the Assignment of Claims Act and are barred by the statute of limitations, and the complaint fails to state a claim upon which relief can be granted, or is barred by the doctrines of res judicata and collateral estoppel. The court concludes the complaint must be dismissed.

This suit has been prosecuted from its beginning in 1979 in the District Court for the Western District of Washington, the United States Court of Appeals for the Ninth Circuit, and in this court by and in the name of plaintiff Northwest Commercial Fishermen's Federal Recovery Association. Plaintiff

sued on claims against the United States assigned to it by unidentified commercial fishermen, to which defendant continually objected. Only when plaintiff filed an amended complaint in this court on May 24, 1983, did it suggest that "named individual plaintiffs bring this claim in their individual capacity and alternatively on valid assignment." This insertion was apparently an afterthought. The purpose of the amended complaint stated by plaintiff's counsel in his affidavit was "so that the issues could be limited to those remaining after the hearings already had in this cause" in the district and circuit courts, not to add plaintiffs to the suit.

Assuming for purposes of this motion, however, that plaintiff's amended complaint was sufficient to bring in the individual owners of the claims, their participation comes too late. The statute of limitations requires suit to be brought within six years of the accrual of a claim against the government. 28 U.S.C.§§2401, 2501. Defendant dates the accrual of a cause of action, if at all, to the mid-1800's. Plaintiff says it was the date of the decision in United States v. Washington, 384 F.Supp.

312 (W.D. Wash.), issued on February 12, 1974. Accepting for a moment plaintiff's dubious proposition that that decision as ultimately confirmed in Washington v. Washington State Commercial Passenger Fishing Vessel Association, 443 U.S. 658 (1979), was a significant reinterpretation of the treaties which resulted in a taking, the new plaintiffs must have properly joined the suit within six years of that date. They cannot be said to have done so until the amended complaint was filed. Notwithstanding the generosity of 28 U.S.C. §1631, and RUSCC 15 and 17(a) generally, the addition of new parties plaintiff here, if Northwest Commericial Fishermen's Federal Recovery Association cannot maintain the action, would give rise to a new suit, see Summit Office Park v. United States Steel Corp., 639 F.2d 1278, 1282 (5th Cir. 1981); Custer v. United States, 622 F.2d 554, 563 (Ct.Cl. 1980), which would run afoul of the statute of limitations.

This is consistent with United States v. Shannon, 342 U.S. 288 (1952), rejecting a joinder of assignors of claims against the government in a suit brought by the assignee, which plaintiff also urges on this court. Applying the predecessor

of the current version of the Assignment of Claims Act, 31 U.S.C. §203, to be codified as amended September 13, 1982, at 31 U.S.C. §3727(a), the Court said,

> "[T]o hold the Act inapplicable because all possible claimants are before the court would be to draw a distinction on the basis of a purely fortuitous factor--whether an assignee, in his suit against the Government can get personal service on his assignor. Even more important, this theory that an assignee can avoid the Act by joining his assignor as a party defendant or unwilling party plaintiff, would not only subvert the purposes of the Act but flood the courts with litigation by permitting them to recognize assigned claims which the accounting officers of the Government would be obligated to reject. Since only a court can give the binding adjudication of the rights of all parties to the transaction--United States, assignor, and assignee--which it is claimed prevents any possible prejudice to the Government, the courts would be applying a laxer rule under the statute than would the accounting officers. Such was not the intention of Congress....We do not believe the Act can be by-passed by the use of any such procedural contrivance." 342 U.S. at 293.

The Act specifies the basis on which claims against the government may be assigned. It has been violated here and plaintiff may not premise

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its suit on the violation. Nor may it rescue the suit through the procedural devices of amendment, joinder, or substitution. Plaintiff was alerted to this deficiency as early as defendant's answer in the district court and chose not to correct it. The individual assignors violated the Act the same as plaintiff. They cannot now escape the bar of the statute of limitations.

Plaintiff's reliance on RUSCC 17(b) to bring this suit because it is a non-profit corporation, authorized to sue or be sued in its corporate name under the laws of Washington, is similarly unavailing. The court does not question its capacity to sue or attain standing sufficient to represent the interest of its members generally. But none of the cases it cites support the proposition that it can maintain a monetary claim against the government in violation of the Assignment of Claims Act. There is no question, for example, that the interests of the assignors here could properly be represented by plaintiff in the suits challenging the treaties, as indeed similar organizations were permitted to do. It is quite another matter, however, for plaintiff to collect

claims against the United States in violation of the Act and bring suit on them.

These deficiencies require that the case be dismissed, but it is not inappropriate for the court to note its agreement with the district court on the substance of the claim, even though the Ninth Circuit reluctantly vacated that portion of the judgment as beyond its jurisdiction. A taking claim could only be sustained by reversing the decisions in the district court and the Supreme Court of the United States in United States v. Washington, 384 F. Supp. 312 (W.D. Wash. 1974), aff'd, 520 F.2d 679 (9th Cir. 1975), and Washington v. Washington State Commercial Passenger Fishing Vessel Association, 443 U.S. 658, respectively, which of course this court has no authority to do. Those judgments are binding on the proposed individual plaintiffs here, see Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326 (1979), and they were represented in that litigation. Washington v. Washington State Commercial Passenger Fishing Vessel Association, 443 U.S. at 692 n.32; United States v. Washington, 459 F. Supp. 1020, 1128 (W.D. Wash. 1978).

Those cases did not result in the taking of any property of the assignors in favor of the Indians; they merely refined the interpretation of the treaties which had long been foretold. See Washington v. Washington State Commercial Passenger Fishing Vessel Association, 443 U.S. at 679, 685. If the non-Indian commercial fishermen earlier had larger harvests of fish, it was because they had enjoyed a share of the catch belonging to the Indians by treaties. The reordering of entitlement between Indian and non-Indian commercial fishermen in accordance with the treaties cannot be considered a taking from the non-Indians, but a righting of the balance the treaties required. If these individuals believe state licensing had given them a greater right, of which they have now been deprived, they should look to the state.

Accordingly, it is ORDERED that defendant's motion to dismiss is GRANTED and the case will be dismissed with costs to the prevailing party. See 28 U.S.C. §2412(a); RUSCC 54(d).

May 3, 1984

H. ROBERT MAYER, Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

NORTHWEST COMMERCIAL FISHERMEN'S FEDERAL RECOVERY ASSOCIATION,	)	
Plaintiff,	)	NO. C79-112SR
v.	)	ORDER TRANSFERRING CAUSE TO UNITED STATES CLAIMS COURT
UNITED STATES OF AMERICA,	)	
Defendant.	)	

PLAINTIFF asks this court to transfer this case to the United States Claims Court in accordance with the decision rendered by the Ninth Circuit on the appeal of this case. The court has reviewed the memoranda in support and in opposition to this motion.

IT IS NOW, THEREFORE, ORDERED that plaintiff's motion to transfer is GRANTED. The Clerk shall transfer the above-entitled case to the United States Claims Court.

The Clerk of the Court is directed to send

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uncertified copies of this Order to counsel of record.

DATED at Seattle, Washington this 2nd day of February, 1983.

BARBARA J. ROTHSTEIN
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NORTHWEST COMMERCIAL FISHERMEN's FEDERAL RECOVERY ASSOCIATION,	)	
Plaintiff-Appellant,	)	
-vs	)	NO. CA 81-3490 DC NO. C-79-112R
UNITED STATES OF AMERICA,	)	
Defendant-Appellee.	)	M E M O R A N D U M

Appeal from the United States District Court
for the Western District of Washington
Honorable Barbara J. Rothstein, Presiding
Argued and Submitted July 8, 1982

BEFORE: WRIGHT, KILKENNY and CANBY, Circuit Judges

This case is an offshoot of two recent cases involving disputes over Indian fishing rights. United States v. Washington, 384 F. Supp. 312 (W.D. Wa. 1974, aff'd, 520 F.2d 676 (9th Cir. 1975), cert. denied, 423 U.S. 1086 (1976); Washington v. Washington State Commercial Passenger Fishing Vessel Association, 443 U.S. 658 (1979). In those cases it was decided that under the terms of certain treaties entered into by the United States, Treaty Indians are entitled to the opportunity to take up to fifty percent of the harves-

table number of anadromous fish at the Indians' usual and accustomed off-reservation fishing grounds. The effect of those decisions was proportionally to reduce the amount of fish available for non-treaty commercial fishermen. Appellant is the assignee of the legal claims of a number of non-treaty commercial fishermen. It sued the federal government for interference with the rights of those fisherment. The district court, having concluded that appellant had failed to raise any genuine issue of material fact and that the United States was entitled to judgment as a matter of law, granted the government's motion for summary judgment.

Although the complaint alleged numerous causes of action, on appeal appellant challenges the entry of summary judgment only as to two claims:

1. That the non-treaty commercial fishermen's property rights, acquired by virtue of their having obtained state fishing licenses, have been taken (or at least diminished in value) by the United States without just compensation in violation of the fifth amendment; and

2. That in the course of the United States v. Washington litigation the government negligently, willfully and knowingly misrepresented to the court that the treaty Indians had not previously been fully compensated for the value of their fhsing rights prior to the decision in that case.

The "Taking" claim

The district court held that as a matter of law the fishermen had no private property right to take fish from the waters of the state of Washington. The court based its decision on Washington Kelpers Association v. Washington, 81 Wa. 2d. 410, 502 P.2d 1170 (1972), cert. denied, 411 U.S. 982 (1973), wherein the Washington Supreme Court held that the fish are owned by the State in its sovereign capacity. The district court held that because no property right existed no compensation was required. As an alternative basis of decision the court held that the rights of the commercial fishermen had been litigated and determined in United States v. Washington, supra, and appellant was collaterally estopped from litigating the rights of non-treaty fishermen as licensees of the State of Washington.

Despite the compelling nature of these arguments we reluctantly conclude that the taking portion of the district court's judgment must be vacated. Although the complaint did not recite an amount of damages sought, in its answer to interrogatories appellant stated that its claim approaches $63,000,000 and that each of the individual fisherman's claims was estimated at $24,000. The jurisdiction of the district courts is limited by the doctrine of sovereign immunity. United States v. Testan, 424 U.S. 392, 399 (1976). Congress has waived that immunity, however, and with certain exceptions not relevant here, it has directed that any claim "against the United States founded either upon the Constitution, or any Act of Congress" be brought in the Court of Claims, 28 U.S.C. § 1491. The district courts are granted concurrent jurisdiction with the Court of Claims but only as to suits for less than $10,000. Inasmuch as the claim presented far exceeds the $10,000 limit contained in § 1346(a)(2), the jurisdiction of the Court of Claims is exclusive. The district court lacked jurisdiction to consider the merits of appellants' taking claim, see Laguna Hermosa

Corp. v. Martin, 643 F.2d 1376, 1378-9 (9th Cir. 1981), and that portion of the court's judgment must be vacated. We decline to grant here appellants' motion to transfer this portion of the case to the Court of Claims, but remand the matter to the district court for disposition in accordance with 28 U.S.C. § 1406(c).

The "Tort" Claim

The district court granted the Government's motion for summary judgment as it pertained to appellant's tort claim on three alternative grounds. The court held that the claim was time barred under 28 U.S.C. § 2401(b), that appellant had failed to take the required step of seeking an administrative remedy under 28 U.S.C. § 2675(a) and, finally, that the Government was entitled to a judgment as a matter of law on the merits of the claim.

We affirm on the ground that appellants have failed to comply with 28 U.S.C. §2675(a). Appellants concede that they made no administrative claim whatever, and contend that for tortious conduct of a lawsuit there is no administrative agency to which they could address their claim. They

offer no authority in support of that contention, and we find it unpersuasive. Appellants' claim is based upon allegedly tortious conduct by officials of the Department of Justice, and that would be the appropriate agency from which to seek administrative relief. 1/ Appellants did not do so. Failure to seek such a remedy necessitates dismissal. House v. Mine Safety Appliances Co., 573 F.2d 609, 617 (9th Cir.) cert. denied, 439 U.S. 862 (1978).

Our conclusion that appellants did not comply with 28 U.S.C. §2675 (a) makes it unnecessary for us to consider the other promising grounds upon which the district court based its decision. Affirmed in part, vacated in part and remanded for further proceedings.

FOOTNOTE 1:

Part of appellants' difficulty in determining the proper place to make an administrative claim may arise from the peculiar nature of that claim. Appellants' allegation might be thought to raise questions of legal malpractice, but the suit complained of was not brought on their behalf, and was successful in outcome. Appellants' claim can probably be most accurately characterized as one for malicious prosecution. See Tinkoff v. United States, 211 F.2d 890 (7th Cir. 1954). That characterization creates severe problems for appellants, because claims for malicious prosecution fall within an express exception to the Federal Tort Claims Act, unless the claim arises from the act or omission of an investigative or law enforcement officer as defined by the Act. 28 U.S.C. § 2680(h). Actions falling within the exception are barred by sovereign immunity.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

NORTHWEST COMMERCIAL FISHERMEN'S FEDERAL RECOVERY ASSOCIATION, Plaintiff, v. UNITED STATES OF AMERICA, Defendant.	NO. C79-112SR ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

THIS MATTER comes before the Court on the parties' cross-motions for summary judgment. Having reviewed the parties' motion, briefs, and supporting memoranda, and being fully advised, the Court finds and rules as follows:

BACKGROUND:

This case is an offshoot of two recent cases involving disputes over Indian fishing rights. United States v. Washington, 384 F. Supp. 312 (W. D. Wash. 1974), aff'd 520 F.2d 676 (9th Cir. 1975), cert. den. 423 U.S. 1086 (1975), rehearing denied 424 U.S. 978 (1976); State of Washington v. Washington State Commercial Passenger Fishing Vessel Association, 443 U.S. 658 (1979). In these cases it was decided that, under the terms of

treaties entered into by the United States, treaty Indians are entitled to the opportunity to take up to 50% of the harvestable number of anadromous fish at their usual and accustomed off-reservation fishing grounds. The effect of these decisions was to proportionally reduce the amount of fish available for non-treaty commercial fishermen.

Plaintiff in this case is the assignee of the legal claims of a number of non-treaty fishermen. As such, plaintiff is suing the federal government for interference with the rights of non-treaty fishermen. The suit seeks relief on five grounds, alleging that:

(1) Plaintiff's property rights, acquired through state fishing licenses, have been taken, or at least diminished in value, by defendant without just compensation in violation of the Fifth Amendment of the United States Consitution;

(2) A special burden, equivalent to a discriminatory tax violating Article 1, sections 8 & 9 and Article 4 of the United States Constitution, has been imposed on plaintiff by the defendant's treaties with the Indians;

(3) The rights of plaintiff to harvest fish

in common with treaty-Indians under defendant's treaties have not been properly protected, thus violating Article 4 and Article 6 of the United States Constitution;[1]

(4) Defendants negligently, willfully and knowingly misrepresented that the Indians had not previously been fully compensated for the value of their fishing rights prior to the decision in United States v. Washington, supra; and

(5) Defendant's conduct was a conspiracy that deprived plaintiff of its civil rights in violation of 42 U.S.C. § 1985 and 18 U.S.C. § 241.

FINDINGS

Summary judgment is proper when there is no genuine issue of any material fact or where viewing the evidence and the inferences which may be drawn therefrom in the light most favorable to the adverse party, the movant is clearly entitled to prevail as a matter of law. Great Western

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1. This claim does not appear to be a separate cause of action, but rather a combination of the "taking" allegation in the first cause of action and the "negligence" allegation in the fourth cause of action. For the purposes of this Order, this claim will be treated as incorporated into plaintiff's second and fourth causes of action and will not be addressed separately.

Bank & Trust v. Kotz, 532 F. 2d 1252, 1254 (9th Cir. 1976). If the movant party satisfies the initial burden of showing the absence of a genuine issue of material fact, then the burden shifts to the opponent to come forward with specific facts showing that there remains a genuine issue for trial. Fed. R. Civ. P. 56(e); Neely v. St. Paul Fire & Marine Insurance Co., 584 F.2d 341 (9th Cir. 1978). The opponent must present these facts in evidentiary form; pleadings alone cannot be relied upon, and the evidence presented must be significantly probative as to any fact claimed to be in dispute. Securities & Exchange Comm'n. v. Murphy, 626 F.2d 633 (9th Cir. 1980).

Applying this standard to the case at hand, defendant is entitled to summary judgment in its favor.

1. No Property Rights Have Been Taken

Plaintiff's taking claim fails as a matter of law, for there is no vested property right to take fish embodied in a commercial fishing license. Washington Kelpers Association v. State of Washinton, 81 Wn.2d 410, 502 P.2d 1170 (1972). No property has been taken, therefore, no compensa-

tion is required.

As an alternative ground for summary judgment, the Court notes that plaintiff is collaterally estopped from litigating the rights of non-Indian fishermen as licensees of the State of Washington. The doctrine of collateral estoppel precludes the relitigation of issues that were actually litigated and necessarily determined in a prior suit. Parkland Hosiery Co. v. Shore, 439 U.S. 322, 326, (1979). The rights of commercial fishermen was an issue litigated and necessarily determined in United States v. Washington, supra, and this decision was specifically found to be binding on all citizens of the State of Washington and on all commercial fishermen. United States v. Washington, 459 F. Supp. 1020, 1128-29 (W.D. Wash. 1978). See also State of Washington v. Washington State Commercial Passenger Fishing Vessel Association, 443 U.S. at 692, n. 32.

2. No Discriminatory Tax Has Been Imposed

No additional burdens have been imposed on plaintiff by the decision in United States v. Washington or by the Indian treaties. The fishing

rights of the Indians under the treaties are rights that were reserved by them. United States v. Washington, 384 F. Supp. at 407. No new rights were granted to treaty Indians. Therefore, the treaties did not create or impose any tax or special burden upon non-treaty individuals.

3. Plaintiff's Negligence Claims Are Barred

Plaintiff alleges that defendant was negligent in its presentment of the case in United States v. Washington. This claim is barred, however, by the applicable statute of limitations, that states:

> a tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues....
>
> 28 U.S.C. § 2401(b).

Viewing the facts most favorably to the plaintiff, this claim accrued on February 12, 1974, the date of the District Court decision in United States v. Washington. See United States v. One 1961 Red Chevrolet Impala Sedan, 457 F.2d 1353 (5th Cir. 1972). However, this claim was filed on January 29, 1979, long after the two year limitation period had passed.

This claim is also barred by plaintiff's failure to seek an administrative remedy. Section 2675 of Title 28 of the United States Code states:

> (a) An action shall not be instituted upon a claim against the United States for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing by certified or registered mail.

This requirement of presentation of a claim to the appropriate Federal agency is jurisdictional in nature and cannot be waived. House v. Mine Safety Appliances Co., 573 F.2d 609, 617 (9th Cir. 1978) cert. den. sub nom. Silver Dollar Mining Co. v. PVO International, Inc. 439 U.S. 862 (1978). No administrative filing was made in this case.

In addition, the merits of plaintiff's negligence claim fail as a matter of law. Plaintiff alleges that the treaty Indians were compensated previously for all their fishing rights by the United States Indian Claims Commission, and that defendant negligently and knowingly failed to

disclose this fact in United States v. Washington. However, the evidence plaintiff offers to show prior compensation is not significantly probative to establish a genuine factual issue. Viewed as a whole, the evidence supports defendant's position that the Indians were compensated solely for ceding the right to use and possess their land, and they did not surrender, no were they compensated for, the right to cross the land and fish at all usual and accustomed grounds. Thus, there is no probative evidence of negligent presentment of the case on this issue.

Plaintiff offers no proof of other instances of defendant's negligence in the presentation of this case.

4. The Statutory Civil Rights Claims

The plaintiff's fifth cause of action alleges violations of 18 U.S.C. § 241 and 42 U.S.C. § 1985. Pliantiff's allegation under 18 U.S.C. §241 must fail, for a criminal statute is irrelevant to a claim for civil recovery. United States ex rel. Savage v. Arnold, 403 F. Supp. 172 (E.D. Penn. 1975).

Courts disagree as to whether 42 U.S.C. §

1985 applies to the United States. Compare, e.g., Alvarez v. Wilson, 431 F. Supp. 136, 142 (N.D. Ill. 1977) (holding that federal officers may be sued under § 1985(1) and § 1985(3), if the complaint alleges racial discrimination) with Moore v. Schlesinger, 384 F. Supp. 163, 165 (D. Col. 1974) (holding that federal officers acting under color of federal law are immune from suit under this statute). This Court need not decide this issue because the plaintiff has failed to state a claim under the terms of § 1985. The only conceivably relevant provisions of §1985 are the portions of sections 2 and 3 that prohibit conspiracies to deprive any person or class of persons of the equal protection of the laws. The plaintiff has failed to state a factual or legal basis for such a claim in this case. There has been no showing that the defendant United States or any federal officials acted improperly in any of the court proceedings at issue. Furthermore, the enforcement of Indian treaties does not violate equal protection principles. Washington v. Fishing Vessel Ass'n., 443 U.S. at 673, n. 20.

For the foregoing reasons, the Court finds

and rules that no genuine issue of material fact exists and as a matter of law defendant's motion for summary judgment is GRANTED as to each and every one of plaintiff's claims. Plaintiff's motion for summary judgment necessarily is DENIED.

IT IS SO ORDERED.

The Clerk of the Court is directed to send uncertified copies of this Order to all counsel of record.

DATED at Seattle, Washington, this 12th day of June, 1981.

BARBARA J. ROTHSTEIN
UNITED STATES DISTRICT JUDGE

Office-Supreme Court, U.S.
FILED
MAY 8 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-1397

In the Supreme Court of the United States

OCTOBER TERM, 1984

NORTHWEST COMMERCIAL FISHERMEN'S FEDERAL RECOVERY ASSOCIATION, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General

F. HENRY HABICHT II
Assistant Attorney General

DAVID C. SHILTON
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Department of Justice
Washington, D.C. 20530
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QUESTION PRESENTED

Whether the United States Claims Court abused its discretion by denying petitioner's motion for leave to file notice of appeal outside of the time limit fixed by Fed. R. App. P. 4(a)(1) where the Claims Court determined that failure to allow sufficient time for mail delivery of the notice of appeal did not constitute "excusable neglect" within the meaning of the Rule 4(a)(5).

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In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-1397

NORTHWEST COMMERCIAL FISHERMEN'S FEDERAL RECOVERY ASSOCIATION, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The judgment order of the court of appeals (App., *infra*, 1a) is unreported. The opinion of the Claims Court (Pet. App. 37-40) is reported at 5 Cl. Ct. 745 (1984).

JURISDICTION

The judgment of the court of appeals was entered on December 12, 1984. The petition for a writ of certiorari was filed on March 4, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

RULES INVOLVED

1. Claims Court Rule 72 provides:

> Review of a decision of this court shall be obtained by filing a notice of appeal with the clerk within the time and manner prescribed for appeals to United

States courts of appeals from United States district courts.

2. Rule 4, Fed. R. App. P., provides in pertinent part:

(a) Appeals in Civil Cases.

(1) In a civil case in which an appeal is permitted by law as of right from a district court to a court of appeals the notice of appeal required by Rule 3 shall be filed with the clerk of the district court within 30 days after the date of entry of the judgment or order appealed from; but if the United States or an officer or agency thereof is a party, the notice of appeal may be filed by any party within 60 days after such entry. * * *

* * * * *

(5) The district court, upon a showing of excusable neglect or good cause, may extend the time for filing a notice of appeal upon motion filed not later than 30 days after the expiration of the time prescribed by this Rule 4(a). Any such motion which is filed before expiration of the prescribed time may be *ex parte* unless the court otherwise requires. Notice of any such motion which is filed after expiration of the prescribed time shall be given to the other parties in accordance with local rules. No such extension shall exceed 30 days past such prescribed time or 10 days from the date of entry of the order granting the motion, whichever occurs later.

STATEMENT

1. Petitioner filed an action in the United States District Court for the Western District of Washington, claiming, inter alia, that its members' fishing rights had been taken without just compensation as a result of the decision in *United States* v. *Washington*, 384 F. Supp. 312 (W.D. Wash. 1974), aff'd, 520 F.2d 676 (9th Cir. 1975), cert.

denied, 423 U.S. 1086 (1976). The district court entered summary judgment in the government's favor on all of petitioner's claims. Pet. App. 57-66. The United States Court of Appeals for the Ninth Circuit affirmed as to all claims except the taking claim (Pet. App. 50-56). Because petitioner sought monetary damages in excess of $10,000 on the taking claim, the court of appeals "reluctantly" concluded that exclusive jurisdiction over the claim was in the Claims Court and that it was required to remand that count to the district court for possible transfer to the Claims Court pursuant to 28 U.S.C. 1406(c) (Pet. App. 52-54). The district court subsequently transferred the taking claim to the Claims Court (Pet. App. 48-49), where, on the government's motion, the claim was dismissed by judgment entered on May 3, 1984 (Pet. App. 41-47). Although the Claims Court dismissed on the basis of the statute of limitations and the Assignment of Claims Act, 31 U.S.C. 3727(a) (Pet. App. 41-46), it noted its view that the taking claim was wholly nonmeritorious (*id.* at 46).

2. Petitioner's notice of appeal to the United States Court of Appeals for the Federal Circuit from the May 3, 1984 judgment of the Claims Court was received by the clerk of the Claims Court on July 3, 1984, 61 days after entry of the judgment and one day after the 60-day period for filing provided by Fed. R. App. P. 4(a)(1). Petitioner mailed the notice from Anacortes, Washington, to Washington, D.C., on June 28, 1984, five days before it was due to be received by the Claims Court clerk's office, using regular United States mail service (Pet. App. 39). Because the notice was untimely filed, it was rejected by the clerk and returned to petitioner.

Petitioner thereupon sought a nunc pro tunc extension of time for filing a notice of appeal under Fed. R. App. P. 4(a)(5) so as to validate its prior tardy filing. The Claims Court denied the motion for an extension, on the ground

that petitioner had not made the showing of "excusable neglect" required by Fed. R. App. P. 4(a)(5) (Pet. App. 37-40). Petitioner noticed a timely appeal to the Federal Circuit from the denial of the extension motion, and filed briefs in the court of appeals challenging both the denial of the extension and the Claim Court's adverse ruling on the taking claim. The government filed a motion to dismiss petitioner's appeal, citing the untimeliness of his notice of appeal from the Claims Court's May 3, 1984 judgment and the subsequent denial of petitioner's motion for extension of time to file that notice of appeal. The Federal Circuit granted the United States' motion and dismissed the appeal by judgment order (App., *infra*, 1a).

ARGUMENT

The denial of petitioner's motion to file a notice of appeal out of time was not an abuse of discretion and plainly does not raise any question meriting this Court's review.

1. a. Rule 4(a)(1) of the Federal Rules of Appellate Procedure provides that a notice of appeal in a civil case to which the United States or a federal officer or agency is a party must be filed within 60 days of entry of judgment. A notice of appeal is filed when received by the clerk of the court, and is not deemed filed upon mailing. See, *e.g.*, *Pryor* v. *Marshall*, 711 F.2d 63, 65 (6th Cir. 1983); *Sanchez* v. *Board of Regents of Texas Southern University*, 625 F.2d 521, 522 (5th Cir. 1980); *Allen* v. *Schnuckle*, 253 F.2d 195, 197 (9th Cir. 1958).[1] The time limit established by Fed. R. App. P. 4(a)(1) for filing of a notice of appeal is generally "mandatory and jurisdictional" and must therefore be strictly observed. *Browder* v. *Director, Ill. Dep't of Corrections*, 434 U.S. 257, 264 (1978); *United States* v. *Robinson*,

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[1]Petitioner does not dispute this proposition. See Pet. 25.

361 U.S. 220, 229 (1960); 16 Wright & Miller, *Federal Practice and Procedure* § 3950, at 361 (1977).[2]

Pursuant to Fed. R. App. P. 4(a)(5), however, the Claims Court has authority to extend the time for filing the notice upon a showing of "excusable neglect."[3] The Claims Court properly determined (Pet. App. 37-40), however, that petitioner's failure to file a timely notice was not due to excusable neglect. This exercise of the Claims Court's discretion is not open to "second guessing" at the appellate level, and thus must be sustained absent a "clear abuse of discretion." *Benoist* v. *Brotherhood of Locomotive Engineers*, 555 F.2d 671, 672 n.1 (8th Cir. 1977); see, *e.g.*, *United States* v. *Myers*, 692 F.2d 861 (2d Cir. 1982).

A party's failure to learn of the entry of judgment generally provides the basis for a finding of excusable neglect. See 16 Wright & Miller, *supra*, at 366-367; *Dugan* v. *Missouri Neon & Plastic Advertising Co.*, 472 F.2d 944, 948 (8th Cir. 1973). Petitioner does not claim that it failed to receive timely notice of the judgment, however, and no other circumstance supports a finding of excusable neglect in this case. Contrary to petitioner's assertion (Pet. 27), petitioner's counsel did not do "everything within their power" to assure timely filing of the notice. Although petitioner was allowed 60 days from the date of judgment in which to appeal, it waited until five days before the notice was due to

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[2]Claims Court Rule 72 confirms that the time limits of Fed. R. App. P. 4(a)(1) govern appeals from the Claims Court to the Federal Circuit.

[3]As amended in 1979 Rule, 4(a)(5) also permits the Claims Court to grant an extension if "good cause" is demonstrated. Petitioner relies solely upon the excusable neglect branch of the Rule, however. In any event, the advisory committee notes accompanying in the 1979 Amendment make clear that the good cause standard is intended to be applied only when the motion is filed before expiration of the time period prescribed by Rule 4(a)(1). 28 U.S.C. App., at 469-470.

be received in Washington, D.C. to mail its notice of appeal. The preparation of a one-page notice of appeal could not have required much time.[4] There accordingly was no sufficient justification for petitioner's failure to act more promptly. Moreover, petitioner admits mailing the notice from its offices in the State of Washington to Washington, D.C., by regular mail, even though it is commonly known that next-day and express delivery services are available for just such situations, and petitioner does not allege that such services were unavailable to it. As the Claims Court found (Pet. App. 39), petitioner simply took the risk that its mailing would be received on the other side of the continent too late for filing.

This is not a case where the untimeliness of the filing was attributable to factors outside of counsel's control, such as *Aldabe* v. *Aldabe*, 616 F.2d 1089, 1091 (9th Cir. 1980), where the notice was timely received by the clerk, but was not formally filed for another two weeks. Rather, this case is similar to other instances in which appeals have been held barred because of avoidable failures to file timely notices. See, *e.g.*, *Meza* v. *Washington State Dep't of Social and Health Services*, 683 F.2d 314 (9th Cir. 1982) (counsel's wife was hospitalized two days before notice was due, but no explanation was given as to why the notice had not been filed sooner, or why other attorneys in the same office could not have attended to the filing); *Airline Pilots in Service of Executive Airlines, Inc.* v. *Executive Airlines, Inc.*, 569 F.2d 1174 (1st Cir. 1978) (counsel's secretary mistakenly noted due date for filing notice); *Fase* v. *Seafarers Welfare*

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[4] A simple form for a notice of appeal is included in the Appendix of Forms to the Rules of Appellate Procedure. 28 U.S.C. App., at 497.

& Pension Plan, 574 F.2d 72 (2d Cir. 1978) (counsel mistakenly relied on practice of other district courts of sending notice of entry of judgment to counsel, and court did not send notice).[5]

b. Without explanation, petitioner cites (Pet. 28) this Court's decision in *Fallen* v. *United States*, 378 U.S. 139 (1964). *Fallen* provides no support for petitioner's contentions. In *Fallen* the Court held timely a prisoner's appeal from a criminal conviction received out of time by the district court clerk where the government conceded that the notice of appeal had been timely delivered to prison authorities for mailing, and where absent irregular collection of mail from the penitentiary, Fallen's notice of appeal would have been timely received by the clerk of the court. The Court concluded that the "record facts" established that Fallen had "done all that could reasonably be expected" to notice his appeal in a timely fashion. 378 U.S. at 144.

This case bears no resemblance to *Fallen*. First, there was no issue in that case as to whether time for filing an appeal should have been extended. Indeed, at the time *Fallen* was decided no authority existed for such an extension in a criminal case. See *United States* v. *Robinson, supra.* Second, the circumstances that dictated relaxation of the jurisdictional character of the filing requirement are absent here. As explained above, petitioner here did not take the steps that reasonably could be expected, especially of a party represented by counsel, to assure timely receipt of his notice of appeal. Moreover, petitioner has presented no information that suggests that unforeseeable delays in the transmission of the mail occurred in this case.[6]

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[5]Indeed, in each of the three cases cited in the text, the court of appeals found that the district court had abused its discretion in finding excusable neglect and permitting the late filing of a notice of appeal.

[6]Petitioner's reliance (Pet. 27-28) on language in *Sanchez* v. *Board of Regents*, 625 F.2d at 522, accordingly is unwarranted.

2. Petitioner argues (Pet. 28-32) further that the "interests of justice" require that its failure to file a timely notice of appeal be excused and that its claim be considered on its merits. However, because of the mandatory and jurisdictional character of the time limit for taking the appeal, the merits of petitioner's claim are essentially irrelevant to whether the Claims Court abused its discretion in denying the motion to extend. In any event, the interests of justice plainly are not disserved by the dismissal of petitioner's appeal. Petitioner claims that the decision in *United States* v. *Washington, supra,* deprived its members of "valuable property rights," because those decisions held that the Indians in Washington had a treaty right to take up to 50% of all harvestable fish at their "usual and accustomed" grounds and stations, and as a result petitioner's members were limited in their fishing activities. To date, the three federal courts which have been confronted with petitioner's taking claim in this case have made clear that it is wholly without merit (see Pet. App. 46-47, 52-53, 60-61). As the Claims Court succinctly stated (Pet. App. 47), the judicial decisions of which petitioner complains

> did not result in the taking of any property of [petitioner's members] in favor of the Indians; they merely refined the interpretation of the treaties which had long been foretold. See *Washington* v. *Washington State Commercial Passenger Fishing Vessel Association*, 443 U.S. [658,] at 679, 685 [(1979)]. If the non-Indian commercial fishermen earlier had larger harvests of fish, it was because they had enjoyed a share of the catch belonging to the Indians by treaties. The reordering of entitlement between Indian and non-Indian commercial fishermen in accordance with the treaties

cannot be considered a taking from the non-Indians, but a righting of the balance the treaties required.[7]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 1985

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[7]We note, as well, that petitioner does not identify any error in the Claims Court's conclusion (Pet. App. 41-46) that petitioner's taking claim is barred by the statute of limitations and the Assignment of Claims Act, 31 U.S.C. 3727(a).

DOJ-1985-05

APPENDIX

United States Court of Appeals for the Federal Circuit

No. 84-1778
51-83C

NORTHWEST COMMERICAL FISHERMAN'S FEDERAL RECOVERY ASSOCIATION, ETC.,
Appellant,

v.

THE UNITED STATES, Appellee.

Judgment

ON APPEAL from the U.S. Claims Court

This CAUSE having been heard and considered, it is

ORDERED and ADJUDGED: DISMISSED, on Appellee's Motion to Dismiss.

DATED December 12, 1984 *ENTERED BY ORDER OF THE COURT*

George E. Hutchinson, Clerk

Clerk

ISSUED AS A MANDATE: February 4, 1985